Ashley Furniture Industries, Inc. *and* Voces de la Frontera. Case 18–CA–18737

December 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 17, 2008, Administrative Law Judge James M. Kennedy issued the attached decision, which he subsequently corrected in an October 6 Errata. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ashley Furniture Industries, Inc., Arcadia, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its plant in Arcadia, Wisconsin, copies of the attached notice marked 'Appendix.'[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted, in English, Spanish, and any other foreign language the Regional Director deems appropriate, by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2007."

Dated, Washington, D.C. December 31, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph Bornong, for the General Counsel.

Thomas R. Trachsel (Felhaber, Larson, Fenlon & Vogt), of Minneapolis, Minnesota, and *Justin H. Silcox of Kostner (Koslo & Brovold),* of Arcadia, Wisconsin, for the Respondent.

John M. Loomis and *Mark A. Sweet,* of Milwaukee, Wisconsin, for the Charging Party.

DECISION[*]

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Whitehall, Wisconsin, on June 17, 2008,[1] based

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent failed to establish a legitimate and substantial confidentiality justification for its unlawful prohibition against employee discussion of the no-match letters. To the extent, however, that the judge's rejection of the Respondent's defense is based on the absence of evidence of any anti-immigrant violence in the Arcadia community, we do not rely on that finding. Rather, we conclude that the Respondent's confidentiality defense fails because, on balance, none of the reasons underlying the Respondent's asserted need for maintaining the confidentiality of the no-match letters outweigh the employees' Sec. 7 right to discuss them.

[3] We have modified the notice-posting provision of the judge's recommended Order to reflect July 3, 2007 as the date of the Respondent's first unfair labor practice, and to delete extraneous language.

[*] Corrections have been made accordinging to an errata issued on October 6, 2008.

[1] Respondent's motion, made at the hearing and reiterated in its brief, to strike material extraneous to the Charging Party's name is granted. Voces de la Frontera (Voices from the Border) as described by counsel is a "community-based organization" whose offices are located in Milwaukee. The parties are agreed that it is not a labor organization as defined in Sec. 2(5) of the Act. Accordingly, Respondent's motion to modify the caption by striking the Charging Party's addendum to its

upon a complaint issued February 15, 2008, by the Regional Director for Region 30 and amended by the Regional Director for Region 18 on May 22, 2008, subsequent to the case being transferred to Region 18 by an order of the General Counsel. The unfair labor practice charge was filed by Voces de la Frontera, on October 2, 2007,[2] and amended thereafter. The complaint as amended alleges that Ashley Furniture Industries, Inc. (Respondent) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent denies that its conduct, essentially undisputed, violated the Act and/or to the extent it may have, its conduct was permissible as a "legitimate and substantial" business reason.

Issues

The principal issue(s) is/are whether Respondent was privileged to tell its employees that they were not to discuss certain matters with fellow employees, including their immediate supervisors, instead limiting their communications to a single member of its human resources department, although an ad hoc exception may have been made for the affected employee's spouse. The issues which were not to be discussed were: (1) a warning for an assembly error; (2) Respondent's receipt of "no-match" letters from the Social Security Administration as it named between 40 and 50 employees; and (3) telling an employee not to discuss the expiration of his work permit.

I. JURISDICTION

Respondent admits it is a corporation operating in Wisconsin and other States and having its headquarters and principal factory in Arcadia, Wisconsin, where it manufactures household furniture. It further admits that it annually sells and ships goods and materials to customers outside Wisconsin valued in excess of $50,000. Accordingly, Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICE EVIDENCE

A. Background

In addition to the Arcadia plant involved here, Respondent has a smaller plant in nearby Whitehall, Wisconsin, about 15 miles northeast. Both towns are in rural west central Wisconsin. Arcadia is about 145 miles southeast of Minneapolis and 245 miles northeast of Milwaukee. Testimony disclosed that Respondent also has plants in Colton, California; Ecru, Mississippi; Ripley, Mississippi; and Leesport, Pennsylvania. It is a large company which employs 10,000 people in total; half, or about 5000, work in Arcadia. Respondent's employee complement in Arcadia is double the population of that town which has a census of only about 2500. In recent years, this area of Wisconsin has experienced an influx of immigrants and Respondent's Arcadia employee demography has changed markedly as well. At the time of the events here, the summer of 2007, Respondent employed in Arcadia and Whitehall about 800 people of Hispanic heritage, most of whom Respondent has recruited. In addition, it has recruited Hmong and Somali immigrants as well. Both of the General Counsel's witnesses testified with the assistance of a translator.

The facts are in large part undisputed. During the spring of 2007 Respondent's human resources department had become aware that the Federal Department of Homeland Security had determined to modify the rules concerning an employer's duty to enforce the provisions of the Immigration Reform and Control Act of 1986 (IRCA). Although I will discuss below in passing what the DHS was attempting to do, it suffices to note here that Respondent was putting in place a procedure to handle the expected annual "no-match" letters from the Social Security Administration. For the past few years it had become accustomed to receiving such letters as its complement of immigrant employees had expanded. The DHS rules had not previously imposed enforcement duties upon employers concerning the employees' eligibility to work in United States beyond requiring new hires to fill out an I-9 form and presenting the appropriate documentation. The new rules imposed additional responsibilities upon employers. It was for that reason that Respondent's human resources department began modifying its internal procedures.

Two of the allegations, however, do not deal with issues raised by the no-match letters. The first deals with a statement made to an alien employee named Demetrio Martinez after he had received some internal discipline. The other deals with another statement made to Martinez after his work permit had expired. I shall deal with the Martinez issues first.

B. Statements to Martinez

Martinez is a sofa assembler. On July 3 Martinez had some trifling dispute with his trainer, someone named Jeff concerning who was responsible for an error in assembling a furniture item. As a result, he was called to an office where an HR employee asked him what had happened. Martinez gave his side of the story and was told to go back to work. Shortly thereafter he was recalled to the office where a superintendent was present. The HR employee told Martinez he had been found guilty of an infraction and issued him a written warning. He testified on direct without contradiction that the HR official told him, "[W]e have come to the conclusion you are the guilty one with a majority of the votes" and "[W]e're going to give you a warning" and "[D]on't say this to anyone." He did not waver during cross-examination. Respondent called no witness on the point. As a result, his direct examination stands unrebutted.

On September 24, Martinez was again summoned to the HR office. The meeting was conducted by Amy Neubauer. Neubauer is a human resource manager normally having responsibility over office employees, not production employees. She was the one who had been selected to handle the "no-match" letters. Although the expiring work permits of production employees was not her usual responsibility, given the "no-match letters" close connection to the work permit issue, it fell upon her to deal with Martinez' situation.

Martinez testified that she asked him if he had a current work permit or "green card." He told her that his work permit was

name ("On Behalf of employees of Ashley Furniture Industries, Inc.") is granted. Since it is not a labor organization, wording in a Board caption should not suggest that its purpose is employee representation. It is a communitywide assistance group targeting Hispanics in need, not an employee group.

[2] All dates are 2007, unless stated otherwise.

no longer current. Martinez says Neubauer responded to this disclosure saying: ". . . she was going to give me 45 days to bring a current work permit. If I wanted to continue working, that she was going to give me those 45 days, and if I didn't submit that, then I was going to be fired—terminated, and not to say this to anybody."

Neubauer did testify concerning the "no-match" letters but gave no testimony about her meeting with Martinez concerning the expiration of his work permit. Accordingly, as above, Martinez' testimony stands unrebutted.

In both cases a management official told Martinez that he was not to discuss what transpired in those meetings with anyone. In each case the implication was that if he did discuss those matters with other people, he would be subject to some sort of discipline for failing to follow the instruction. The General Counsel argues these words not only interfered with Martinez' right to seek the mutual aid and protection of other employees, they also constituted a threat—either way it violated Section 8(a)(1).

C. The Threats Prohibiting Revelation of the "No-Match" Letters

The evidence concerning Respondent's statements to employees concerning their receipt of "no-match" letters comes not only from the General Counsel's employee witness, Veronica Jimenez, it also comes from Respondent's witnesses Amy Neubauer and her superior, Executive Vice President James Dotta. Indeed, it is in large part supported by a neutral third party, a community translator named Joyce Stellick.

Dotta explained that the Company was concerned about the impact any public revelation the "no-match" letters might have. He cited three things which concerned the corporation. They were: confidentiality concerning the social security numbers themselves; the allegedly real possibility that employees receiving "no-match" letters would be subject to harassment or retaliation; and the Company did not want misinformation or false rumors which might scare its Hispanic work complement into leaving the area.

As a result, he consulted with legal counsel about the best way to approach the upcoming DHS rules. After consultation, he settled on a three-stage procedure. In the first, the Company would give the employee 30 days to contact the Social Security Administration to rectify whatever problem social security had identified. This instruction was to be delivered to the employee by a letter read to him or her by an HR officer. If, at the end of the first 30 days the matter had not been cleared up, a second 30-day letter was to be issued. If that did not resolve the issue, then the employee would be given an additional 3 days as a firm deadline. If the deadline was not met, the employee was to be fired. Pattern letters were prepared to that effect and readied for the expected arrival of the "no-match" notifications.

Dotta believed that in order to obtain the confidentiality result he sought, he needed to limit the number of HR officials handling the expected letters. In fact, Respondent at Arcadia had approximately 14 HR people, 7 managers, and 7 generalists. Each of these was assigned to a specific area of the plant or the headquarters. In keeping with his concept of limiting knowledge of the issue to only the affected employee, Dotta decided to select an experienced HR manager who did not normally work with production employees and who would be seen as a neutral. To that end, he selected Neubauer who primarily worked with finance, computer engineers, and purchasing department employees. He testified he gave her the following instructions on July 19 concerning the confidential nature of her work:

> [WITNESS DOTTA] I told her it was very, very important, the confidentiality was of utmost concern to me, and that therefore she was supposed to talk to me if she had any issues with the process.
>
> . . . .
>
> A. And that she should give instruction when she talked to the employees that they're to contact the Social Security Administration, that's the people that could help them, and if they had any further concerns, they should contact her.

Whatever Dotta may have instructed Neubauer to do, Veronica Jimenez' testimony describes what actually happened. She is a production employee who builds headboards. In late July, she was one of 40 or 50 employees who had become the subject of "no-match" letters. Neubauer summoned her to the office and advised her that her name and social security number did not match. Using an interpreter from one of the Mississippi plants, she gave Jimenez the newly-styled warning letter which the Company had created providing for the first 30-day period. As the discussion was ending and as Jimenez stood to leave, Jimenez testified, Neubauer pointed at her and said, "This is confidential. You cannot talk about this to your coworkers or your supervisor and, if possible, not even to your husband."

As the first 30-day period began to end, the second round began. According to a company position statement,[3] about thirty employees' situations remained unresolved. Jimenez testified that Neubauer, through a translator, told her that if she didn't get this issue settled within another 30 days, she would be terminated. Indeed, the second letter, read by the translator, explicitly says in reference to the final 3-day period, that if at the end of the 3-day final deadline Respondent "cannot verify your work authorization and identity, your employment with Ashley will be immediately terminated." Jimenez further testified, "I was told again that this meeting was confidential, that I could not talk about it, neither with my supervisor nor my coworkers." She also said that she was never given the letter; that it was never in her hands, only read to her.

Shortly thereafter, she had a third meeting with Neubauer and another translator. At this meeting the translator told her she could continue working, but gave no explanation for the change of heart. The translator told her she could forget about what had been said in the previous meetings.

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[3] This statement is in evidence as GC Exh. 4. Although statements prepared by counsel are admissible, I do not rely upon it except as general background. While counsel may have been attempting to be entirely accurate when drafting it, letters of this sort are at least second-hand and subject to imprecision, given that the attorney authoring the document is not percipient to the event itself.

Neubauer did give testimony regarding the procedure she followed in delivering the letters, but gave virtually no evidence concerning what she told Jimenez. She did deny telling Jimenez that she could not speak to her spouse about what was happening.

Finally, on September 28, a community translator named Joyce Stellick (under contract with the county) was approached by one of Respondent's male employees who spoke only Spanish. He had lost the business card of the person to whom he was supposed to report his work eligibility status and his social security information. He asked Stellick if she could contact Respondent on his behalf and find out who the individual was that he should be getting in touch with. Unable to find the HR number in the phone directory (only the retail store's number was in the book), Stellick went to the public library where the librarian had the number to hand and dialed it for her.

A woman named Amy (presumably Neubauer) answered and the two had a conversation. Stellick:

> I proceeded to explain to her that a gentleman had come to my office, supposedly had a card with a name and a phone number, he had lost it, and I was just trying to assist him to get that information for him. And at that point in time she said, "Who are you again?" which I repeated again I was an interpreter. And she asked me, "With whom?" I told her what I did. So it went back and forth, that conversation.
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> Q. Okay. Keep going. Was there more of the conversation?
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> A. Yes, there was. She also asked me how come this gentleman had come to me, and I said, "Well, because I am an interpreter," of course, and all he wanted to know was who to contact at Ashley and I was trying to assist him. **She told me that it was her understanding that the employees at Ashley were not supposed to go outside the Company to talk to anyone.** And at that point in time I repeated my question and I said, "Well, is he supposed to come to see you or someone else?" And she said, "Me." And I asked her again for her name. As she gave it to me, I wrote it down on a piece of paper in front of me. [Bolding added.]

Stellick gave the information to the gentleman and he, presumably, found it useful.

Under the circumstances, I find that it was Respondent's policy to insist that the employees who had received a "no-match" letter say nothing about it to anyone other than a single HR representative—specifically Neubauer. Neubauer says that she did tell employees who objected that they could speak about it with their spouse or an attorney. Assuming that is so, it is clear that they were not to speak of the matter to coworkers, supervisors, managers, or to any outsiders. As evidenced by her discussion with Stellick, Neubauer well understood that requirement. She was carrying out Dotta's instructions to the letter.

III. LEGAL ANALYSIS

Any analysis, of course, starts with Section 7 of the Act. That section states in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose* of collective bargaining or *other mutual aid or protection*, and shall also have the right to refrain from any or all such activities." (Emphasis added.) This section, therefore, protects employees and guarantees their right to engage in concerted activity for their mutual aid and protection. Concerted activity, self-evidently, means employees can communicate to one another about common problems they are having at the workplace and such communications are protected by Federal law. Furthermore, the Board and the courts have given it an expansive meaning, reaching beyond workers simply discussing workplace matters among themselves. It is an unfair labor practice under Section 8(a)(1) to prohibit employees from engaging in such activity.

Indeed, for it to be a violation of Section 8(a)(1), an employer's conduct does not even need to rise to the level of a specific threat. The statute states: "It shall be an unfair labor practice for an employer to—interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Thus, prohibiting employees from speaking to one another about common concerns in the workplace or speaking to outsiders about those concerns are both interdicted by the statute. In a union context, an easy example is the ejection of a union official, who has a contractual right to be there, from an employer's premises. The ejection of their representative has the direct effect of inhibiting employees from speaking to their union about workplace issues. See, for example, *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995). But it is congruently true in a nonunion context, as well. The seminal case, of course, is *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962), where the Court found protected the walkout of employees who concertedly left work to protest extremely cold conditions.

Then, in the context of finding activity "concerted" within the meaning of Section 7, the Court in *Eastex, Inc v. NLRB*, 437 U.S. 556 (1978), held that employees had the protection of Section 7 when they sought to distribute literature in nonworking areas during nonworktime which, among other things, urged a State legislature to oppose "right to work" language in a constitutional revision. Here, the employees were making an appeal to the drafters of a modified constitution, people clearly outside the workplace, but who had the power to affect conditions of labor as a whole.

And, of course, the steps preliminary to actual concerted activity are also protected. See *Whittaker Corp.,* 289 NLRB 933 (1988). After all, if an employer acted swiftly enough to prevent the initial steps leading to concerted activity which would become clearly protected by Section 7, it could obviously prevent that activity entirely and never have to deal with its employees over such issues. That result is clearly contrary to the Congressional intent found in Section 7's wording. Moreover, when an employer lumps employees together and treats them as a group the employer is treating them collectively. *Enterprise Products,* 264 NLRB 946, 949 (1982). So, whatever they may do within that group for mutual aid and protection may be regarded as Section 7 concerted conduct. What, then, of an employer's gag rule intended to prevent a workplace issue from gaining traction?

Clearly, insofar as a gag rule prohibiting the discussion of wages is concerned, it has long been held that such rules impinge upon Section 7 rights and are unlawful. E.g., *NLRB v. Main Street Terrace Care Center,* 218 F.3d 531, 537 (6th Cir. 2000), enfg. 327 NLRB 522 (1999); *Waco, Inc.*, 273 NLRB 746, 748 (1984) (rule explicitly prohibiting employees from discussing wages among themselves is a clear restraint of Sec. 7 rights and violates §8(a)(1)); also *Jeannette Corp.,* 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976).

The General Counsel has presented here three different gag rule or confidentiality scenarios. I shall take them in the same order as discussed in the previous section.

First is the direction to Martinez concerning the discipline which had been levied upon him as a result of the sofa assembling incident. After the warning was issued to him, he was told he was not to say anything about it to anyone. As one can readily see from his testimony, however, he believed the discipline to be unwarranted; the assembling mistake, in his view, had been committed by another employee. Once he was told not to talk about it to anyone, he was rendered to a position of no recourse. There was no one to whom he could go to try to set it right. He couldn't discuss it with his fellow employees without running afoul of the instruction. If he did breach the instruction he would have been committing an act of insubordination. Respondent's imposition of this gag rule clearly interfered with his ability to ever discuss his circumstances with a friendly confidante. This record does not reflect whether Respondent has in place any appeal procedure, so it is unclear whether he could even have gone to a higher-level HR official. Martinez, of course, had no understanding of Respondent's hierarchy.

The General Counsel correctly cites *Verizon Wireless,* 349 NLRB 640, 658–659 (2007), for the proposition that prohibiting employee discussion of workplace concerns, particularly if they relate to discipline or potential discipline, violates Section 7. One caveat to this rule is that an employer may be insulated from liability under the Act if it can demonstrate a legitimate and substantial interest in the confidentiality outweighs the rights of employees under Section 7. See generally *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967); *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967); *Caesar's Palace,* 336 NLRB 271, 272 fn. 6 (2001); *Jeannette Corp.,* supra; *Waco, Inc.,* supra.

In this case, however, Respondent offers no defense whatsoever. Martinez' testimony is unrebutted. Accordingly, I find that Respondent's instruction to him to the effect that he was barred from speaking about the discipline which had been imposed is a violation of Section 8(a)(1).

Similarly, when Amy Neubauer told him he could not discuss with anyone the fact that his work permit had expired, Respondent also violated Section 8(a)(1). Neubauer was certainly within her rights to ask Martinez for a current work permit, even if only to assist him to obtain a renewal. What she could not do was to tell him he couldn't talk about it with anyone. It is quite common for Hispanic workers working in United States to be in close contact with community organizations who assist with immigration issues. Indeed work permits are a common subject for such groups. Many have become quite expert in providing accurate and timely assistance to employees in exactly Martinez's situation. While there is no evidence on the point, it is quite likely that the Charging Party has such expertise, or if it does not, it knows how to find it. If Martinez did not already know about assistance sources, speaking with a coworker would be a normal and routine way for him to start the process. Respondent's instruction prohibited him from doing so, thereby depriving him of the ability to exercise his Section 7 right to obtain from his fellow employees information relating to their mutual aid and protection.

As I noted before, it is the instruction alone which tends to interfere with or restrain an employee from engaging in concerted activity and is sufficient to support such a violation. It need not rise to a specific threat since interference and restraint is all the statute requires. Even so, a threat is usually implied if such instructions are given. See *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999), cited by the General Counsel. *Westside* also supports the general proposition that gags of confidentiality are overbroad regardless of whether the rule was enforced or discriminatorily motivated. See also *Lutheran Heritage Village–Livonia,* 343 NLRB 646 (2004) (If a company rule does not expressly restrict the Sec. 7 rights of employees, it will still violate Sec. 8(a)(1) of the Act if employees would reasonably construe it to prohibit activity protected by Sec. 7 or if it has been applied to prohibit protected conduct.) The gag order here is unlawful for the same reason as the gag order concerning company discipline failed to pass muster.

The more interesting legal question is the injunction given by Neubauer pursuant to Dotta's plan, to each of the employees who had received a "no-match" letter. Jimenez' testimony, together with the admissions made by Neubauer and Dotta (and supported by Stellick) clearly falls into the same general category as the other two. The principal distinction is that the instruction was given concerning something the Social Security Administration had triggered—to correct some irregularity perceived by that agency, rather than coming from employee ranks. Nonetheless, rather clearly, Respondent had determined to treat as a group all of those whose names were provided by the Social Security Administration. This was the "lumping" which the Board perceived in *Enterprise Products,* supra. And, the observation I made concerning Martinez' inability to obtain assistance applies equally to Jimenez and the other persons named in the "no-match" letters. The instruction allowed them no place to obtain advice or assistance—not their fellow employees, not family, not an attorney and not even a community assistance group such as the Charging Party.

In some respects this interdiction was worse than that imposed by the employer in *Eastex*. There, the employees sought favorable treatment from the State legislature. Here, the employees only would have sought the assistance of fellow employees, spouses, or a community group, although legal assistance might have been sought as well. I think it is fair to say that absent some legitimate defense, Respondent committed an 8(a)(1) violation closely tracking those already found.

Respondent asserts that it had a substantial business justification for its instruction. As noted above, there were three components of that purported justification: (1) Maintaining the

privacy and security of the employees' social security numbers in order to prevent identity theft; (2) The possibility that employees who were the subject of "no-match" letters would be subject to harassment and/or retaliation by community members who harbored xenophobic tendencies; and (3) To prevent false information and misinformation which might have the effect of scaring away the Hispanic employees it had recruited.

These reasons were all given by vice president for human relations Dotta. To prove that there were harsh anti-immigrant feelings in the community, Respondent offered in evidence a number of newspaper articles (including some online reprints) published in the newspapers of nearby cities.

I have no doubt that the appearance of these articles was in Dotta's mind as he cast about for a way to efficiently address what seemed to be coming from the Department of Homeland Security.

Both the Charging Party and Respondent have, in their briefs, supplied an informative discussion about the impact of DHS' proposed rule in 2007. Prior to 2007, employers, while subject to both administrative and criminal sanctions for knowingly employing undocumented workers, were not considered to be part of the enforcement procedures set forth in IRCA. In general, an employer's obligation to comply with that statute simply required them to have an employee fill out an I-9 form, reviewing certain listed documents which established both the employee's identity and his/her right to work in United States. The change proposed by DHS related to the portion of the statute which criminalized an employer's behavior if he "knowingly" employed individuals who did not have the right to work in the United States. In the past, the DHS and its predecessor agency had had difficulty proving that such improper employment was "knowing" where the employer had relied on spurious documentation presented by an employee. The new rule removed that hurdle by declaring that "no-match" letters from the Social Security Administration were prima facie evidence that an employer knew the employee was undocumented. It stated that "no-match" letters created an evidentiary presumption that the employer had knowingly hired undocumented employees and that such letters could be used to find the hiring to be criminally unlawful. The proposed rule also set forth certain "safe harbor" practices which would insulate an employer from that kind of prosecution. The rule was scheduled to go into effect on September 14, 2007.

On August 31, the ACLU Immigrant's Rights Project obtained a nationwide temporary restraining order against DHS prohibiting enforcement of that new rule from the United States District Court for the Northern District of California. That temporary restraining order was converted to a preliminary injunction on October 10. The August 31 TRO was the reason that Respondent ceased its efforts to require the employees to clear up whatever issues they had with the Social Security Administration and for that reason employees such as Jimenez were relieved of any further obligation, at least until the court made its final ruling.

I have reviewed the newspaper accounts and while I agree that there had been some level of public discussion in 2006 about the arrival of immigrants in the Arcadia-Whitehall area (some had been hired by a large chicken processor also located in Arcadia), much of the vituperation seems to have come from the then mayor of Arcadia. He had proposed certain anti immigrant city ordinances and there had been vigorous pro and con discussions at city council meetings. Eventually the mayor withdrew his proposals.

Dotta also mentioned, in support of his third reason, that the Company wished to reduce negative rumors about its employment of immigrants, two different incidents which seem to have occurred. The first involved a rumor that Immigration and Customs Enforcement (ICE), the investigative branch of DHS that enforces the Immigration and Nationality Act, had made some sort of appearance in nearby Winona, Minnesota (25 miles southwest) and was poised to make a raid on employers in Arcadia. The second was a rumor that Respondent was not deducting payroll taxes from its employees' pay, allegedly because it thought it could get away with not paying taxes because its employees were illegal aliens. Respondent took immediate steps to counter both of these issues, but nevertheless remained on the lookout for additional incidents. Essentially, Dotta feared that information concerning the "no-match" letters would lead to more of the same.

While I think there is some validity to Respondent's anxiety, I think the concerns about privacy and the protection of social security numbers is overblown. Respondent is not the guardian of such matters, except to the extent they are maintained in its own files. In a real sense this is nothing more than unnecessary paternalism. The employees are well aware of the need to keep these numbers confidential. Silencing them for that purpose is a clear overreach. Moreover, such an instruction would not resolve the problem of identity theft which is more likely to come from repositories of such numbers, not from individuals. I do not find this reason, even if taken in good faith, to warrant the deprivation of rights guaranteed to employees by Section 7.

The next reason, the possibility that the employees would be subject to xenophobic misbehavior by the general public, might actually be valid had there been any violent incident to deal with. Nothing of that kind had occurred in 2006 and the entire matter had begun to cool by the summer of 2007. In this sense I think Respondent's speculation about what might happen was premature. It had successfully defended two other rumors, one of which actually focused on the question of special treatment of illegal aliens, the false claim by uninformed people in the community that Respondent was not withholding payroll taxes on the aliens working for it.

Respondent is the principal employer in the community and must be considered a large employer wherever it might be located. It is, no doubt, subject to the same scrutiny that other large employers routinely face. Large companies with big payrolls are unlikely to be routinely cheating the tax authorities, particularly in the numbers employed here, around 5400 in this area of Wisconsin. A rumor as far-fetched as this one is unlikely to have much traction, particularly when it is promptly scotched. Besides, coworkers often discuss their paychecks with one another and sometimes show their pay stubs to each

other. Ordinary revelation of that information would put to rest any such concerns from the Hispanic employees' coworkers.[4]

Likewise, the rumor about an immigration raid by ICE turned out to be unfounded. In fact, this kind of rumor occurs in all areas of the country where there are large numbers of immigrant employees. West central Wisconsin is not unique in this regard and Dotta's fears are not exceptional. Employees come and go for all sorts of reasons. Fear of ICE is not likely high on the list. Again, I do not see the factual validity of this assessment. In my opinion an ICE raid is so unlikely that Dotta's fears are not well founded. Even if a raid were to occur, Respondent would not be the cause and employees would know that, for it is not in Respondent's interest to report itself to ICE. It is certainly not a reason for employees with valid work permits to flee from Wisconsin.[5] There is no reason to think that Respondent could not have dealt with no-match letter misinformation in an equally effective manner.

Therefore, I do not find Respondent's second and third justifications for imposing the confidentiality requirement on the issue of an employee's name appearing in a Social Security Administration "no-match" letter to have persuasive weight. They simply do not rise to a level where they can be regarded as legitimate and substantial reasons for depriving employees of their statutory rights under the National Labor Relations Act. The connections are simply too tenuous. Respondent's legitimate and substantial business justification defense fails as inadequately supported.

Accordingly, I conclude that in each of the instances alleged by the General Counsel, Respondent interfered with and restrained its employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1) as alleged.

THE REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Additionally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole, I make the following.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On July 3, and various dates in July and August 2007, Respondent violated Section 8(a)(1) of the Act when it prohibited its employees from speaking to any other person about matters affecting their employment, including disciplinary proceedings, instructions concerning Social Security no-match letters and connected employment eligibility issues, and the updating of work permits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Ashley Furniture Industries, Inc., Arcadia, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Prohibiting its employees from speaking to any other person about matters affecting their employment, including disciplinary proceedings, instructions concerning Social Security no-match letters and connected employment eligibility issues, and the updating of work permits.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its plant in Arcadia, Wisconsin, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 18 after being signed by the Respondent's authorized representative, shall be posted, in English, Spanish, and any other foreign language the Regional Director deems appropriate, by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since August 31, 2007.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, DC, September 17, 2008

[4] If an employer is in such financial straits that it decides to stop paying its quarterly payroll taxes, it will likely be a problem common to all employees, not just immigrants.

[5] I make no brief here one way or the other for undocumented families of legal immigrants who may share quarters with their breadwinner who holds a valid work permit.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from speaking to any other person about matters affecting your employment, including disciplinary proceedings, instructions concerning Social Security Administration no-match letters and related employment eligibility issues, or the updating of work permits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the above rights guaranteed you by Federal law.

ASHLEY FURNITURE INDUSTRIES, INC.